bankruptcy proceedings, I consider that in the circumstances of this case that purpose had been fulfilled as he had filed his affidavit promptly on 9 April 1993, 2 days after service of the bankruptcy notice became effective.

For the reasons I have given, I had dismissed the appeal with costs.

SIVARAJAH A/L K. SUBRAMANIAM & 4 ORS.

v.

ANDREW YEOH ENG HUAT & 2 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. D2-22-1047-1993]
8 JUNE 1994

PRACTICE & PROCEDURE: Application to consolidate - Plaintiffs commencing 3 actions on same day against the same defendants for the same relief in respect of 3 separate companies on the same grounds and similar facts - Multiplicity - O. 15 rr. 1(1)(a) & 5(1) RHC - Jurisdiction of the Court - Whether an abuse of process of the Court.

The plaintiffs instituted 3 actions against the same defendants on the same day and time in the same division of the Court seeking declarations that they were the duly appointed directors of the company and that the appointment of the defendants to their offices was null and void and for an injunction restraining the defendants from holding themselves out or acting in their respective offices. In the 3 actions the relief sought was the same in respect of 3 separate companies on the same grounds and based on similar facts. The plaintiffs applied for an order for consolidation of the 3 actions.

Held:

[1] Under O. 15 r. 1(1)(a) as read with r. 5(1) of the Rules of the High Court 1980 a plaintiff may in one action claim relief against the same defendant in respect of more than one cause of action if the plaintiff claims in the same capacity in respect of all the causes of action but the Court has the discretion to order separate trials if it appears that the joinder may embarass or delay the trial or is otherwise inconvenient.

[2] The plaintiffs relied on the case of *Edward Goh Geok Seng v. Dunstan Dumpangol & Ors.* (No. 2) [1989] 2 MLJ 119, where the facts were similar to the present case but the Court held there was no abuse of process of the Court. The Court in the present case declined to follow that decision as there was nothing to indicate that the provisions of O. 15 rr. 1(1)(a) & 5(1) read with the rule against multiplicity of proceedings were brought to the attention of the learned Judge, which would have placed the onus on the plaintiffs to explain why 3 actions instead of 1

were brought. The Court in the instant case would have refused this application and instead struck out the other 2 actions later in time with costs if the plaintiffs had filed the 3 actions delibarately to increase costs. However in view of the fact that the plaintiffs seem to have acted on the authority of *Edward Goh's* case and the non opposition by the defendants to this application, the Court allowed the application with no order as to costs of the application and further ordered that the parties pay their own costs thrown away heretofore and hereafter for commencing 3 actions instead of 1.

[Application allowed with no order as to costs].

Cases referred to:
Edward Goh Geok Seng v. Dunstan Dumpangol & Ors. (No. 2) [1989] 2 MLJ 119 ***(refd)***
Searle v. Choat [1884] Ch. D. 723 ***(refd)***
Poulett v. Hill [1893] 1 Ch. 277 ***(refd)***
Williams v. Hunt [1905] 1 KB 512 ***(refd)***
Cropper v. Smith [1884] 26 Ch. D. 700

Legislation referred to:
Courts of Judicature Act 1964, Schedule, para 11
Rules of the High Court 1980, O. 15 rr. 1(1)(a), 5(1), O. 18 r. 19, O. 29 r. 1, O. 92 r. 4
Judicature Acts (UK)

For the plaintiffs - G. Sri Ram; M/s. Sri Ram & Co.
For the defendants - Suhendran (Patsy Chin Yew Khim with him); M/s. Abdul Aziz, Ong & Co.

JUDGMENT

Richard Talalla J:
This action was commenced 20 December 1993 by the plaintiffs through their solicitors. In it the plaintiffs claim that they are the duly appointed directors of a certain company and are its duly constituted board of directors, that the 1st and 2nd defendants holding themselves out as directors of the company had purported to remove the 4th and 5th plaintiffs as directors of the company on the ground that they had ceased to be so owing to their failure to acquire the necessary qualification shares in accordance with the articles of association of the company, that the article in question was deleted and substituted by one stating that a director shall not be required to hold any share qualification, that these 2 defendants purported to appoint the 3rd defendant as secretary of the company and that despite demand the defendants continue in their respective purported offices. The plaintiffs seek by way of relief declarations that they are the duly appointed directors of the company and that the appointment of the defendants to their said offices is null and void and an injunction restraining the defendants from holding themselves out or acting in their respective offices, damages, interest and costs.

On the same day and effectively at the same time the plaintiffs through the same solicitors commenced another two actions in the same division of this Court as evidenced by consecutive registered numbers of those two actions to wit D3-22-1408-1993 and D4-22-1409-1993. In all three actions the parties are the same and the pleadings also the same *mutatis mutandis* relative to company, dates of meetings and wording of the articles of association in question, the effect of the articles however being the same. Thus to put it as succinctly as I can, in three separate consecutive actions commenced on the same day and at the same time in the same division of this Court the same plaintiffs represented by the same solicitors have claimed against the same defendants the same relief albeit in respect of three separate companies on the same grounds based on similar facts.

The plaintiffs had also caused to be filed in each of the 3 actions at the time of commencement thereof accompanied in each action by a certificate of urgency a summons in chambers for interim relief by way of injunction each of which said summonses was returned *seriatim* on 16 and 23 February and 6 June 1994 and awaits leisurely disposal unhindered by anyone.

Under O. 15 r. 1(1)(a) (the said rule) of the Rules of the High Court 1980 (the said rules) as read with r. 5(1) of that order a plaintiff may in one action claim relief against the same defendant in respect of more than one cause of action if the plaintiff claims, and the defendant is alleged to be liable, in the same capacity in respect of all the causes of action but if it appears to the Court that the joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient. As I understand it the said rule must be applied bearing in mind at all times the rule against multiplicity of proceedings. Not surprisingly the plaintiffs applied for an order for consolidation of the 3 actions. When the application came on for hearing I asked why the 3 actions had been filed when in

truth only 1 action should have been commenced. Counsel for the respective parties both thereupon conceded, and I believe rightly so, that only one action should have been commenced in the circumstances. I then said that the 2nd and 3rd actions in time should be struck out and the statement of claim in this the 1st action amended to include the claims in the 2nd and 3rd actions and that by reason of multiplicity of proceedings there was an abuse of the process of the Court and *prima facie* costs thrown away would have to be paid by the solicitors personally. In fairness seeing that the point originated from the Court and not desiring to take the solicitors by surprise the application was adjourned for further consideration.

At the resumed hearing senior Counsel appeared for the plaintiffs and submitted as authority supporting the solicitors in commencing the 3 actions and the application for consolidation, the case of *Edward Goh Geok Seng v. Dunstan Dumpangol & Ors. (No. 2)* [1989] 2 MLJ 119, where the facts were to all intents and purposes the same as the facts here and the defendant had applied under O. 18 r. 19 and O. 92 r. 4 of the said rules for an order that the plaintiff's action be struck out on the ground that it was an abuse of the process of the Court. In dismissing the application the learned Judge at page 120 said:

> ... I am satisfied that there is no improper purpose on the part of the plaintiff in filing the present action. Therefore, I cannot see how any question of abuse of the process of the Court can be said to arise. Hence, the defendants application is dismissed with costs.
>
> Costs are awarded against the defendants because, in my view, having regard to what I have said in para 4 above, their application is really unnecessary. The defendants' Counsel knew very well that the plaintiff's application under O. 29 r. 1, which was under certificate of urgency, ought to be disposed of as soon as possible in order to preserve the *status quo* and yet he filed the defendants' application and insisted that the application be heard first. Hence, his conduct has not only occasioned unnecessary costs but also unnecessary delay in the proceedings.

The decision on the face of it may well have been given *per incuriam*. There is nothing to indicate that the provisions of the said rule were brought to the attention of the learned Judge, which said rule, as read with r. 5(1) of O. 15 along with the rule against multiplicity of proceedings which also appeared not to be before the Judge, would have placed the onus on the plaintiff to explain why 3 actions instead of 1 were brought. Also in that case the learned Judge would appear to have held a belief that the defendant in making his application was aiming at delaying the plaintiff's application for an injunction which was being brought on a certificate of urgency, a situation which does not arise in these proceeding for here it was the Court itself that raised the question of multiplicity of proceedings and attendant abuse of process. Accordingly with respect I do not follow that decision.

It is true that in our Courts the adversary system is observed and the Court acts as an umpire generally and does not go down into the ring and box with one or other of the contestants. However there are, in my view, instances when the Court could and should enter the fray. The Court will do so to prevent injustice being done. It will also so do, as in this case, to ensure that the practice and procedure prescribed for the due administration of justice is properly observed. To my mind the Court should certainly step in when non observance overtly, as in this case, contributes to the backlog of cases presently so rife in our Courts, delay, administrative pressure in our registry and the cost of litigation. That cost in these times is so prohibitively high it makes a farce of justice being available to all. In truth it is available only to those who can afford it. A *fortiori* the Court should supervise the machinery of justice and at every turn ensure that there is no delay and that the expense of litigation is kept to a minimum, in the hope that if not now then at some future time justice will be available to all who seek it.

Not one word of explanation was forthcoming from the plaintiffs or their solicitors as to why it was thought fit to bring 3 actions instead of applying the said rule and bringing 1 action. There was not the slightest suggestion that by reference to r. 5 to bring 1 action would embarrass or delay the trial or be otherwise inconvenient.

The rule against multiplicity of proceedings is seen in the Courts of Judicature Act 1964 and in particular the schedule thereto, paragraph 11. In *Searle v. Choat* [1884] 25 Ch. D. 723 at page 727, Cotton LJ in reference to English legislation said that the whole tenor of the Judicature

Acts was to require all proceedings as far as possible to be taken in one action. In *Poulett v. Hill* [1893] 1 Ch. 277, C.A. at pages 280 and 281 Lindley LJ gave judgment as follows:

> In this case the learned Judge has made a mistake which is attributable to a wish to save costs. On 26 May 1891, the plaintiffs commenced against the defendant an action for foreclosure, and by the writ they claimed not only foreclosure but also, as the practice has been since the passing of the **Judicature Acts,** a personal order for payment. Under that writ an account of what is due would be directed - an account which, being taken on the footing on which such accounts were always taken in Chancery, would include interest down to the date of the certificate, and an order would be made for personal payment of the amount found due. Before the **Judicature Acts** a personal order for payment could only be obtained by bringing a common law action, in which interest could only be recovered down to the date of the writ, and a personal order for payment of the subsequent interest could only be obtained by a fresh action; but now that a personal order can be obtained for payment of what is found due on taking the account, such second action is unnecessary. In *Farrer v. Lacy, Hartland & Co.* 31 Ch.D. 42, 51 the form of judgment is given which was settled by the Court of Appeal. Whether this particular point was present to the mind of the Court is not quite clear, but a general form was settled giving a personal order for payment of what was found due for principal and interest on taking an account, so that the necessity for a subsequent action for interest is taken away. The plaintiffs then could in the first action have obtained a personal order for payment of all that was due to them for principal and interest, and the present action is unnecessary. It we were to affirm the order under appeal our decision would lead to bringing improper and vexatious actions; and, though I believe that the attempt to recover in the present action was well meant, it was a mistake.

In *Williams v. Hunt* [1905] 1 KB 512 at page 513 the defendant sought a stay of proceedings in the King's Bench Division on the ground that the whole cause of action was the subject of an action pending in the Chancery Division. Collins MR at page 514 said:

> I am of opinion that execution must be stayed. It seems clear to me that this is an attempt to defeat what the Court of Appeal held to be the law in *Poulett v. Hill.*
>
> Where two separate remedies are possible, and a start is made by putting in force one of those remedies by a writ which would entitle the plaintiff to the relief he subsequently desires, he cannot by deliberately leaving that out of his claim reserve his right to ask for it in another proceeding. Where proceedings have been started, it is an abuse of the process of the Court to divide the remedy where there is a complete remedy in the Court in which the suit was first started.

That the facts in the English cases abovestated are distinguishable from the facts in this case is of no moment. The principle and the mischief it cures embraces all the cases including this. Indeed I believe it to be of universal application.

Now the plaintiffs are before the Court by way of supplication. They want the 3 actions consolidated into 1 action, relief against the very mischief they have perpetrated by bringing 3 actions when they should have in the first place brought 1 action and thus obviated the necessity of applying to the Court for an order of consolidation. As matters stand, by reason of the administrative practice in this division of the Court of allocating actions to individual Judges for disposal by reference to the registered number of the action, this action will be handled by me, the 2nd action will be presided over by Dato' V.C. George J. and the 3rd action by Dato' Dr. Zakaria Yatim J. and could lead to contradictory judgments being given in each case. Obviously the situation must be remedied. Ordinarily I would have refused the application for an order for consolidation and instead struck out the 2 actions later in time with costs as indicated at the first hearing of this application. Certainly I would have done so had the plaintiffs' solicitors filed the 3 actions deliberately to increase costs. They seem however to have acted on the authority of *Edward Goh's* case abovestated. In the circumstances of this case only and seeing also that senior Counsel for the defendants had indicated that he was in agreement with the submission of Counsel for the plaintiffs and was not opposing the application, I will not strike out the 2 later actions. *Cropper v. Smith* [1884], 26 Ch. D. 700 was a case relating to amendment of pleadings. In that case at pages 710 and 711 Bowen LJ said that it is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases and he, the learned Judge, knew of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to

correct, if it can be done without injustice to the other party. In the present case the damage has already been done and it seems futile in the circumstances to punish the plaintiffs by striking out the 2 later actions only to have them then plead the matters in those actions in the first action.

Accordingly I hereby make an order in terms of the first numbered paragraph of the summons namely that the 3 numbered actions be consolidated and do proceed as 1 action. As to title of the consolidated action I make an order in terms of paragraph (ii) of the summons and add that the principal action shall be this action. As to the matter raised in paragraph (iii) of the application namely that 1 action be tried immediately after another I reserve the matter and accordingly adjourn the application to that extent. As to costs sought in paragraph (iv) of the summons, as the application was not opposed I make no order as to the costs of the application and further order that plaintiffs and the defendants do pay their own costs heretofore and hereafter thrown away by reason of 3 actions being commenced instead of 1 action.

S. RAMASAMY S/O CHOCKALINGAM CHETTIAR

v.

KM. S. KUMARAPAN CHETTIAR @ KN. S. KUMARAPPA CHETTIAR S/O K. M. S. CHOCKALINGAM CHETTIAR

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CIVIL SUIT NO. 469 OF 1977]
20 JULY 1994

PRACTICE & PROCCEDURE: Order 34 r. 8(2) RHC 1980 - Court issuing notice to plaintiff to show cause why his action should not be dismissed for want of prosecution - Policy behind the granting of power to Court - Principles applicable - Dispute regarding administration of estate - Delay of 16 years and 7 months in setting case down for trial - Whether delay intentional and contumelious - Whether explanation for delay satisfactory.

The plaintiff and defendant were brothers and the beneficiaries of their late father's estate. The defendant was the administrator of the estate. On 14 September 1977 the plaintiff filed a writ of summons against the defendant alleging improper management and fraud. Subsequently, the parties made several interlocutory applications but on 17 February 1980 the plaintiff filed his statement of claim and on 1 March 1980 the defendant filed his defence. The plaintiff applied for the defence to be struck out as showing no reasonable defence to the plaintiff's statement of claim and after several postponements it was fixed to be heard on 14 May 1981. The Court subsequently informed the parties that the application would not be heard on 14 May but would be heard on a date to be fixed. Thereafter no date was given by the Court and no inquiries were made to the Court resulting in the case becoming dormant. 7 years later, the defendant filed a notice of intention to proceed and on 8 May 1988, the defendant applied for an order that the action be dismissed for want of prosecution. The application came up for hearing on 3 October 1988 but after several adjournments, was struck out in the absence of both parties. At the same time the Court ordered that a notice to show cause be issued by the Court to the plaintiff pursuant to O. 34 r. 8(2) of the Rules of the High Court 1980 (RHC). The plaintiff filed the summons for directions a day before the